

E-Filed 10/13/10

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALFONSO MIRA, et al.,

No. C 10-3394 RS

Plaintiffs,
v.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS, WITH LEAVE
TO AMEND**

GMAC MORTGAGE, et al.,

Defendants.

I. INTRODUCTION

Defendant GMAC Mortgage Corporation ("GMAC") moves to dismiss Alfonso and Carla Mira's Complaint in its entirety. The Miras brought suit in Contra Costa County Superior Court in March of 2010, alleging six claims for relief grounded on California statutory and common law. This case involves the foreclosure of a home. The Miras have brought suit against GMAC, the former servicer of their home loan, and the entity that purchased their property at foreclosure sale. Specifically, the Miras allege breach of contract, fraud, negligence, intentional tort, and violation of a California Foreclosure Prevention Act. They seek damages as well as declaratory and injunctive relief. GMAC asserts that the Miras failed to serve their Complaint and, despite the lawsuit, the Mira's home was sold at a foreclosure sale in May of 2010. GMAC explains it discovered the lawsuit on July 15, 2010, when it learned that a lis pendens had been filed by the Miras. GMAC

No. C 10-3394 RS
ORDER

1 then removed the matter, asserting that the parties are diverse and that the amount in controversy
 2 exceeds \$75,000. GMAC then filed the instant motion to dismiss, to strike the Miras' request for
 3 punitive damages and attorney fees, and to expunge. The Miras have not filed papers in opposition
 4 and, according to GMAC, have not participated in the lawsuit since filing the Complaint. The Miras
 5 failed to appear at the hearing held on October 7, 2010. Because the Complaint fails to allege any
 6 cognizable claim, it must be dismissed in its entirety, with leave to amend. Because it is still
 7 possible that an amended complaint may raise a viable, real property claim, defendant's motion to
 8 expunge lis pendens is denied without prejudice.

9 II. FACTUAL BACKGROUND

10 The factual background supplied in the Mira's Complaint is problematically lean. What is at
 11 least clear is that the property in dispute is located at 1726 Teakwood Drive in Martinez, California.
 12 From the attached Deed of Trust, it appears the Mira's entered into their loan obligation sometime
 13 near February 17, 2006. That document also indicates that GreenPoint Mortgage Funding acted as
 14 the lender, Marin Conveyancing Corporation acted as the trustee, and Mortgage Electronic
 15 Registration System ("MERS") acted as the named beneficiary. Although the Complaint does not
 16 clarify what role, exactly, defendant GMAC played, GMAC asserts in its opposition papers that it
 17 acted as the "servicer" of the Mira's loan. As GMAC explains its role, a servicer is an entity
 18 retained by a lending party to communicate with borrowers, receive monthly payments, and
 19 foreclose on mortgage loans in default. While the Miras do not detail any facts relating to their
 20 foreclosure process, GMAC explains that they at some point defaulted on their loan payments. An
 21 entity known as "ETS" recorded a Notice of Default and Substitution of Trustee on January 28,
 22 2010. ETS recorded a Notice of Trustee Sale on April 30, 2010. GMAC then purchased the
 23 Teakwood Drive property on May 28, 2010 at auction for \$292,000. They recorded a Trustee's
 24 Deed Upon Sale on June 4, 2010.

25 III. LEGAL STANDARD

26 A. Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6)

27 When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a
 28

1 court accepts a plaintiff's factual allegations as true and construes the complaint in the light most
 2 favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Dismissal is appropriate
 3 where a complaint lacks "a cognizable legal theory or sufficient facts to support a cognizable legal
 4 theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citation
 5 omitted). In the context of a Rule 12(b)(6) motion, a district court generally may not consider
 6 material beyond the pleadings. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552
 7 (9th Cir. 1984). The exception is material which is properly submitted as part of the complaint.
 8 *Amfac Mtg. Corp. v. Arizona Mall of Tempe*, 583 F.2d 426, 429-30 (9th Cir. 1978).

9 To state a claim for relief, Federal Rule of Civil Procedure 8(a)(2) demands that a pleading
 10 include a "short and plain statement of the claim showing that the pleader is entitled to relief." The
 11 Supreme Court has instructed that this mandate does not require "detailed factual allegations," but
 12 "demands more than an unadorned, the-defendant-harmed-me accusation" or "naked assertion[s]
 13 devoid of further factual enhancement." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal
 14 quotation marks omitted). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation
 15 of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
 16 544, 555 (2007)). The tenet that allegations are construed in a light favorable to the plaintiff does
 17 not apply, however, to bare legal conclusions. *Twombly*, 550 U.S. at 555 ("Threadbare recitals of
 18 the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Even
 19 where the plaintiff alleges something more than a bare legal conclusion, *Twombly* requires a
 20 statement of a plausible claim for relief. *Id.* at 544. Weighing a claim's plausibility is ordinarily a
 21 task well-suited to the district court but, where the well-pleaded facts do not permit the court to infer
 22 more than a mere *possibility* of misconduct, the complaint has not shown the pleader is entitled to
 23 relief. *Iqbal*, 129 S. Ct. at 1950.

24 B. Federal Rule of Civil Procedure 9(b)

25 Federal Rule of Civil Procedure 9(b) provides that "[i]n allegations of fraud or mistake, a
 26 party must state with particularity the circumstances constituting fraud or mistake." To satisfy the
 27 rule, a plaintiff must allege the "who, what, where, when, and how" of the charged misconduct.

1 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). In other words, “the circumstances
2 constituting the alleged fraud must be specific enough to give defendants notice of the particular
3 misconduct so that they can defend against the charge and not just deny that they have done
4 anything wrong.” *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). By
5 contrast, “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged
6 generally.” Fed. R. Civ. Pro. 9(b). Moreover, “[i]n the context of a fraud suit involving multiple
7 defendants, a plaintiff must, at a minimum, identif[y] the role of [each] defendant[] in the alleged
8 fraudulent scheme.” *Swartz v. KPMG, LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (*quoting Moore v.*
9 *Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)).

10 IV. DISCUSSION

11 A. Breach of Contract

12 GMAC denies any contract—implied or otherwise—existed between it and the Miras and
13 moves to dismiss the Mira’s breach claim on that basis. In their Complaint, the Miras allege
14 GMAC¹ acted under an implied agreement. Under the terms of this supposed implied agreement,
15 GMAC was obligated to make “reasonable efforts to maximize the present value of the Mira’s loan”
16 by modifying the terms of the Mira’s loan agreement.² The Miras also claim GMAC had an
17 obligation to provide “information” to “fully document the loan and increase said loan credit or
18 default rating,” to disseminate that information “to the proper personnel,” and to act honestly,
19 truthfully, and in a timely manner. The Miras claim GMAC breached this agreement when it failed
20 to provide them with information regarding the “status” of their trust deed, improperly handled and
21 calculated “income for purposes of modifying the loan,” and in some meaningful way delayed the
22 loan modification process. The Miras provide no further detail.

23 GMAC denies that it had a contractual relationship of any kind with the Miras. As the loan
24 servicer, it insists its services were engaged for the benefit of the lender. *See, e.g., Lomboy v. SCME*

25
26 ¹ Technically, the Miras claim one “American Home Mortgage Servicing, Inc.” entity breached the
contract; presumably, this is a typo.

27 ² While the Miras suggest GMAC was contractually obligated to modify the terms of their loan
agreement, they actually insist elsewhere that GMAC *lacked* the authority to do so.

1 *Mortg. Bankers*, No. 09-1160, 2009 WL 1457738, at *5 (N.D. Cal. May 26, 2009) (dismissing
2 breach of contract claim against loan servicer on the grounds that no contractual relationship exists
3 between a borrower and a loan servicer). Even if, generally speaking, a borrower and loan servicer
4 are not bound to one another by contract, it is of course possible that the parties may by their
5 conduct enter into a contractual relationship. Here, though, the Miras have supplied virtually no
6 facts to support their theory that an implied contract existed. Even assuming one did, they have also
7 not advanced meaningful facts to demonstrate *what* conduct constituted breach. As the Miras have
8 not adequately pleaded a plausible breach of contract claim, their first claim for relief must be
9 dismissed with leave to amend.

10 B. Fraud & Intentional Tort

11 The Mira's fraud claim (their fourth claim for relief) alleges only that GMAC "made a
12 representation" as to its authority to modify the terms of the Mira's loans. The Miras also contend
13 GMAC "concealed" from the Miras the fact that it lacked the authority to do so. Aside from this
14 blanket assertion, the Miras provide no facts to support their fraud claim. Essentially, the Miras
15 assert that "defendant made a promise about a material matter without any intention of performing
16 it," but fail to detail or in any way explain what this promise was or when it was made. Assuredly,
17 the tone of the Complaint suggests the promise was one to modify the loan, but the Miras have only
18 vaguely hinted at such a promise. The fraud claim does not even approach the particularized
19 pleading required by Rule 9(b) and must be dismissed, with leave to amend.

20 In their fifth claim for relief for "intentional tort", the Miras insist GMAC "falsely told the
21 homeowner that a mortgage modification was available to them," but "the defendant did not have
22 authority nor the capability to modify the loan." Earlier, the Miras seemed to state the opposite,
23 when they insisted GMAC breached its implied contract when it willfully failed to modify, despite
24 its ability to do so. While the Miras title this claim for relief an "intentional tort," it is essentially a
25 rehash of their fraud argument. Because plaintiffs add no further details here, this claim must also
26 be dismissed for failure to meet the heightened pleading requirements of Rule 9(b).

27 C. Negligence & Violation of California's Foreclosure Prevention Act

1 GMAC also moves to dismiss the Mira's negligence claim as well as their assertion that
2 GMAC violated California's Foreclosure Prevention Act. The Miras frame these as separate claims
3 for relief; because they suggest the latter piece of legislation establishes the operative duty of care in
4 the former, however, it makes sense to analyze them together. The plaintiffs assert that GMAC had
5 a duty to "act in good faith and fair dealing, to maintain information, and calculate a modified
6 payment." In contradiction to their assertion elsewhere that GMAC *lacked* the authority to modify
7 their loan's terms, they assert here that GMAC's failure to do so breached a standard of care
8 established in California's Foreclosure Prevention Act.

9 The Miras appear to focus on the provisions of the Act codified in California Civil Code
10 sections 2923.52-53. For a certain class of loans, the Act provides an additional ninety-day period
11 between when a foreclosing party records a notice of default and when that party may foreclose on
12 the property. The purpose of the period is to expand the time in which borrowers may attempt to
13 modify their loan agreements. Section 2923.53, in turn, exempts certain loan servicers who have
14 opted to engage in loan modification programs from the requirements of section 2923.52. It then
15 establishes certain criteria that exempt modification programs must meet. Neither section, however,
16 appears to *require* a lender or loan servicer to modify a loan. Certainly, servicers must comply with
17 California's comprehensive statutory foreclosure framework, including all provisions that encourage
18 the parties to engage in modification discussions. Nowhere in the statute, though, is there any
19 indication that a loan servicer *must* modify a loan agreement. Plaintiffs do not direct the Court to
20 any case authority to support their reading of the statutory scheme. Accordingly, insofar as the
21 Mira's negligence and statutory claims rely on an argument that GMAC breached its duty to modify
22 the terms of their loan agreement, these claims must be dismissed. *See Mabry v. Aurora Loan*
23 *Servs.*, 85 Cal. App. 4th 208, 231 (2010) (interpreting sister statute, section 2923.5, and declaring
24 that "there is no *right*, for example, under the statute, to a loan modification") (emphasis in
25 original).

26 D. Declaratory & Injunctive Relief
27
28

1 Finally, GMAC moves to dismiss the Mira's sixth and final claim for "declaratory and
2 injunctive" relief. According to the Complaint, a live controversy exists "concerning the respective
3 rights of the parties with respect to the validity and enforceability of the foreclosure." Specifically,
4 the Miras insist the sale was improperly noticed, in violation of California Civil Code section
5 2923.5. As neither injunctive nor declaratory relief are independent "claims," as it were, this Order
6 construes plaintiffs' sixth claim for relief as an argument that GMAC violated section 2923.5. That
7 provision governs the filing of a notice of default. As an initial matter, the Miras do not explain
8 how, exactly, GMAC violated the section. More importantly, though, California courts have
9 recently clarified that the remedy for a violation is postponement of foreclosure sale until the
10 notification defect is fixed. *See Mabry*, 85 Cal. App. 4th at 223 ("The available, existing remedy is
11 found in the ability of a court in section 2924g, subdivision (c)(1)(A), to postpone the sale until
12 there has been compliance with section 2923.5."). The remedy disappears, however, after a
13 foreclosure sale takes place. As the court in *Mabry* persuasively concluded after thoroughly
14 examining the statutory framework, "[t]here is nothing in section 2923.5 that even hints that
15 noncompliance with the statute would cause any cloud on title after an otherwise properly conducted
16 foreclosure sale. We would merely note that under the plain language of section 2923.5, read in
17 conjunction with section 2924g, the only remedy provided is a postponement of the sale before it
18 happens." *Id.* at 235. Accordingly, even if the Miras had adequately pleaded a violation of section
19 2923.5, a violation would not entitle them to either injunctive or declaratory relief. This claim must
20 therefore be dismissed without leave to amend.

21 E. Motion to Strike

22 GMAC moves to strike, in the event any claims survived its motion to dismiss, the Miras'
23 request for punitive damages and attorney fees. In light of the analysis employed above dismissing
24 all claims, the motion to strike is moot.

25 F. Motion to Expunge Lis Pendens

26 Finally, GMAC asks that the Court expunge the Miras' lis pendens. Under California law, a
27 court "shall" expunge a lis pendens if it finds either that "the pleading on which the notice is based
28

1 does not contain a real property claim,” Cal. Civ. Proc. § 405.31, or that “the claimant has not
 2 established by a preponderance of the evidence the *probable validity* of the real property claim,”
 3 Cal. Civ. Proc. § 405.32 (emphasis added). “Unlike most other motions, . . . the burden is on the
 4 party opposing the motion [to expunge] to show the existence of a real property claim.” *Kirkeby v.*
 5 *Superior Court*, 33 Cal. 4th 642, 647 (2004) (citing Cal. Civ. Proc. Code § 405.30). “Probable
 6 validity” means that “it is more likely than not that the claimant will obtain a judgment against the
 7 defendant on the claim.” *Orange County v. Hongkong and Shanghai Banking Corp. Ltd.*, 52 F.3d
 8 821, 824 (9th Cir. 1995).


9 A real property claim is a cause of action “which would, if meritorious, affect . . . title to, or
 10 the right to possession of, specific real property. . . .” Cal. Civ. Proc. Code § 405.4. Because the
 11 property has already been sold, the Miras would need to advance claims that would support setting
 12 aside that sale in order to meet their burden. *See, e.g., Holmes v. Deutsche Bank Nat’l Trust Co.*,
 13 No. 09-1413, 2010 WL 3749430, at *4 (S.D. Cal. Sept. 23, 2010). Because plaintiffs may amend
 14 their Complaint, defendant’s motion to expunge should at this juncture be denied without prejudice
 15 as premature.

16 V. CONCLUSION

17 The Miras have not advanced any cognizable claims and their Complaint is dismissed in its
 18 entirety. With the exception of their sixth claim for relief, the Miras may amend their Complaint if
 19 they can do so in good faith. They must file any amended Complaint within thirty days of the filing
 20 of this Order. Failure to file an amended complaint within the allotted time period will result in (1)
 21 dismissal on the merits as reflected in this order; (2) dismissal on added grounds of failure to
 22 prosecute; and (3) the grant of defendant’s motion to expunge lis pendens.

23 IT IS SO ORDERED.

24
 25 Dated: 10/13/10

26 
 27 RICHARD SEEBORG
 28 UNITED STATES DISTRICT JUDGE

No. C 10-3394 RS
 ORDER